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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 658.

LAWRENCE WAYNE TYREE,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Respondent contends that the petition for writ of certiorari should be denied.

QUESTIONS PRESENTED.

1. A trial court's charge in a Federal Employers' Act case on the issue of negligence of the employer in using the language of the Act and a correct and complete definition of proximate cause as it relates thereto contains no error prejudicial to the plaintiff.

2. Where the trial court correctly states to the jury in its general charge the substance of a plaintiff's request to charge it is not error prejudicial to the plaintiff to decline to use specific language suggested by plaintiff's counsel.

STATEMENT OF CASE.

Petitioner's statement of the case is a correct résumé of part of the evidence. It overlooks other evidence which is crucial to a full understanding of the questions presented. Since the jury awarded a recovery to the plaintiff on his first cause of action, the accident giving rise to that cause of action has, of course, no relevance here.

The accident giving rise to the second cause of action occurred in the Frigidaire plant in Moraine City, Ohio. Plaintiff was standing on a loading platform alongside a switch engine, waiting for a signal to pull out with cars which had been loaded. There were bundles of corrugated paper stacked in rows on the loading platform parallel to the tracks and three to six feet from them. Some of these bundles suddenly fell on plaintiff.

The bundles had been stacked by Frigidaire employees and the evidence was conflicting as to whether they encroached over a yellow line painted on the platform to mark the space along the tracks which should be kept clear. The only positive evidence regarding the cause of the bundles falling was the testimony of a brakeman named Chapman who saw a high-lift machine operated by a Frigidaire employee move into the easternmost or back stack (62a, 63a) and said:

> "Q. And so then the distance that they were back from the yellow line wasn't what caused the bundles to hit Tyree and Miller, but the fork of this high-lift going under the bundles and exerting pressure and causing them to slide forward? A. I think that is correct." (63a.)

Chapman also said that Tyree or Miller, the man by him, could have bumped the bundles. (64a.) At least two witnesses testified that the bundles were stacked neat and even, leaving the space between the yellow line and the tracks clear. Durham (72a), and Bergman (83a, 84a).

ARGUMENT.

1.

The charge of the District Court as affirmed by the Circuit Court of Appeals conforms to and follows both the letter and intent of the Federal Employers' Liability Act and the decisions of this Court.

The petitioner's counsel complain about the use of the words "proximate cause" and "proximately contributed" in this case arising under the Federal Employers' Liability Act. The seed which gave birth to this initial appeal and this petition is a special instruction requested by counsel for petitioner and containing the words "proximately caused." The special instruction, to be sure, attempted to place these words in the context of the statutory standard of an accident resulting in whole or in part from the negligence of a carrier, but the charge to the jury by the trial court accomplished precisely the same result.

We submit that this case does not come before this Court because of a conflict between the decision of the Sixth Circuit and applicable decisions of this Court. *Rogers vs. Missouri Pacific Railroad Company,* 1957, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, decides the *test of a jury issue* and not the charge of the Court. In *Rogers* the charge given by the trial court was not even mentioned. The Supreme Court of Missouri had held as a matter of law that the plaintiff had failed to present evidence sufficient to establish a jury question, and this Court reversed with the following holding:

> "Under the Federal Employers' Liability Act, the *test of a jury case* is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury." (Emphasis added.)

Certainly there is a clear distinction between the test of a jury issue and the test of liability. The test as to a

jury issue is whether reasonable minds may differ. The test of liability is whether the necessary issues of fact have been established by a preponderance of the evidence. The *Rogers* case establishes a standard for determining which cases arising under the Federal Employers' Liability Act must be submitted to a jury. It does not purport to do anything more. The Act does not impose absolute liability, but turns rather on questions of negligence and causation. The Act does not displace common law standards. A charge relating to proximate cause, when placed in the statutory context of an accident resulting in whole or in part from a carrier's negligence, is without error.

In *Bertrand vs. Southern Pacific Company*, 282 F. 2d 569, 573 (1960 CCA9), the Court discussed the *Rogers* case and stated:

> "The Court in that case * * * was not speaking of 'the test of liability of the railroad carrier' * * * but 'the test of a jury case.' "

The same distinction was made by the Third Circuit Court of Appeals in reviewing the *Rogers* standard for submission of a case to a jury.

> "The language indicates that the role of a defendant's negligence in helping bring about the injury may be small. It does not suggest that an F.E.L.A. plaintiff can carry his burden of proof without evidence that the role was real."
>
> *Dessi vs. Pennsylvania Railroad Company*, 351 F. 2d 149, 151 (1958 CCA3).

The cases cited at page 9 of Petitioner's Brief are concerned solely with the test of a jury case and have no direct bearing on the issue presented by this case. The *DeLima* and *Page* cases cited at page 10 of the Brief are concerned with instructions to juries on proximate causa-

tion in actions arising under the Jones Act and the Federal Employers' Liability Act. The problem presented by those cases, however, is the fact that the standard common law definition of proximate cause which the trial courts gave was not placed in the context of the statutory standards. The trial court in the present case was careful to avoid any such error. The distinction was expressly pointed out by the Court in the *Page* case:

> "This case does not call for any wholesale condemnation of the use of language of proximate causation in cases under this Act. Our holding is confined to the instructions and the facts of this particular case."
>
> *Page vs. St. Louis Southwestern Rwy. Co.*, 312 F. 2d 84, 92 (1963 CCA5).

The jury was properly charged on the nondelegable character of the defendant's duties in this case and there could be no confusion as to direct or remote causes if the jury found that Frigidaire had improperly stacked the bundles in question. There was evidence that the bundles were properly stacked at the time of the accident, and there was abundant evidence that the stacking of the bundles had nothing to do with the accident. Even if there was negligence on the part of the defendant, there can be no recovery if the accident did not result in whole or in part from such negligence. The jury could have found that the accident was caused solely by the act of the petitioner or his co-worker in bumping the bundles or by the isolated act of a Frigidaire employee in knocking the bundles over with the highlift truck. Petitioner's argument that such intervening acts play no part in an action under the Federal Employers' Liability Act suggests a desire to do away with the concept of causation entirely. Such a desire has no roots in the statute.

Petitioner's counsel attempts to achieve a double standard of causation in F.E.L.A. cases. This was rejected with the finding that the Act makes no "distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence." *Ganotis vs. The New York Central Railroad Company*, 342 F. 2d 767, 768-9 (1965-CCA6). See also *Morrison vs. The New York Central Railroad Company*, 361 F. 2d 219 (1966-CCA6). A similar attempt met with a similar fate in *Page vs. St. Louis Southwestern Railway Co.*, 349 F. 2d 820 (1965-CCA5). In those cases, as in this, the language of proximate causation merely defines the legal meaning of resulting in whole or in part from employer or employee negligence. The simple effect of direct language in a jury charge should not be obscured.

Proof of negligence proximately causing injury is a necessary element for a judgment in a F.E.L.A. case. No error is committed when the standard definition of proximate cause is included in a charge which carefully places the definition within the language of the Act. Such a charge and a decision affirming it create no conflict with the test of a jury issue set forth by this Court in the *Rogers* case. No issue is present which warrants granting of the pending petition for a writ of certiorari.

2.

The trial court's charge fairly and adequately informed the jury on the law. The plaintiff was not prejudiced thereby.

Petitioner's counsel requested the use of "proximately caused by the defendant's act or omission" in his request to charge and now argues that such language should not be used or explained to the jury.

The trial court has a free choice of the text of its charge. It must instruct so as to fairly and adequately inform the jury of the law. When this has been done, regardless of the particular phraseology used, its duty is satisfied. *Gibson vs. Lockheed Aircraft Service*, 1956, 350 U. S. 356, 76 S. Ct. 366, 100 L. Ed. 395.

In each instance where the Court referred to causation it used the key statutory language "in whole or in part." The statute was read to the jury including "* * * resulting in whole or in part from the negligence of * * * such carrier." (115.) The statutory language echoes through each turn of the instructions. The final summation of the instructions states:

> "Now what do you say after a full, fair and impartial consideration of all the evidence in this case? Was the defendant negligent? Whether such negligence, if any, either *in whole or in part* proximately caused the injury of which he complains?" (122a.)

No confusion was left as to the applicable statutory standard. There was no necessity that the trial court use counsel's text.

CONCLUSION.

This case was fully and fairly submitted to the jury. The jury's verdict was consistent with the evidence. *Basham vs. Pennsylvania Railroad Company*, 1963, 372 U. S. 699, 8 S. Ct. 965, 10 L. Ed. 2d 80.

We respectfully submit that the petition for a writ of certiorari must be denied.

Respectfully submitted,

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